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IN THE

Supreme Court of the United States

No. 152...

JOHN E. GIBSONS,

Petitioner,

vs.

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now John E. Gibbons, petitioner herein, and respectfully petitions this Honorable Court to grant a Writ of *Certiorari* to review the opinion and judgment of the United States Circuit Court of Appeals for the Sixth

Circuit, rendered and entered on the 15th day of December, 1948, rehearing being denied on February 1, 1949, in the case lately pending in said Circuit Court, styled John E. Gibbons, appellant, vs. The Detroit and Toledo Shore Line Railroad Company, appellee, being Cause No. 10636 on the docket of said Circuit Court (R. 236, 245); said judgment of said Circuit Court affirming the judgment of the United States District Court, for the Northern District of Ohio, Western Division, Judge Hicks and Judge McAllister, Circuit Judges, concurring in said judgment upon the grounds found by said District Court, while Circuit Judge Allen concurred in the judgment *"not on the grounds stated"* in the opinion of said Circuit Court, but upon a ground not raised in said Circuit Court or determined by said District Court, (R. 236); and which said affirmance of said District Court judgment by said Circuit Court of Appeals became final on February 1, 1949, by the denial by said Circuit Court of the petition for rehearing. (R. 245.)

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals, in said cause of John E. Gibbons (appellant), petitioner herein, vs. The Detroit and Toledo Shore Line Railroad Company (appellee), respondent herein, which petitioner seeks to have reviewed, appears on page 236 of the transcript of the printed record filed herewith, a correct copy of said opinion being appended hereto. (P. 32.)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was instituted in the Common Pleas Court of Lucas County, Ohio, by John E. Gibbons, petitioner herein, on the 6th day of January, 1944; and, upon motion of respondent herein, was removed to the District Court of the United States for the Northern District of Ohio, Western Division, where petitioner herein filed his original complaint on February 29, 1944, and his final amended complaint on May 20, 1946, set forth in the record, (R. 2 to 9), seeking to have his seniority rights restored as a fireman in the employment of respondent; to recover damages for time lost by reason of respondent's failure and refusal to restore petitioner to his seniority rights; and to afford petitioner medical examinations, or an opportunity therefor, at reasonable times.

It is undisputed that John E. Gibbons, petitioner herein, signed a written application for employment by respondent, as a locomotive fireman, on February 14, 1929 upon a form, prepared and printed by respondent, a correct copy of the lower portion of said application, (Exhibit B), being as follows:

"....

If put to work, I understand that my employment is only temporary until this application is approved.

Signature (signed) John Edward Gibbons

Address .....

Dated 2/14/1929

.....

Recommended for employment as .....

At .....

.....

Date .....

Approved:

.....

General Manager "

It is undisputed that immediately after signing this application petitioner successfully passed respondent's required physical examination by Dr. Briggs, respondent's medical examiner in Toledo, Ohio (R. 80); that petitioner was then put to work as a fireman in respondent's Lang Yard, Toledo, Ohio, by one J. F. Hazel, respondent's superintendent in charge of hiring firemen in Lang Yard, the secretary of said J. F. Hazel having theretofore taken petitioner's application for employment at the request of J. F. Hazel (R. 81); that petitioner continued to work as a fireman for respondent in Lang Yard during February and March, 1929; was furloughed by respondent on account of reduction in force and slack business in March, 1929 (R. 82); and was given a leave of absence by respondent in May, 1929 (R. 198); all in accordance with the written agreements. It is undisputed that petitioner would have worked regularly for respondent as a firman throughout the entire year of 1929 had it not been for slack business, (R. 200); that petitioner was recalled to active duty by respondent in December, 1929, as a fireman in Lang Yard, but that after working a few days appellant was again furloughed because of reduction of force and slack business (R. 82); that owing to the general depression, existing from the fall of 1929 to 1935, petitioner and several of respondent's firemen, senior to petitioner on respondent's firemen's rosters, were not recalled to active duty by respondent until 1935 (R. 184, 200); that in 1934, with the assistance of J. F. Hazel, petitioner secured four months' employment by respondent as a machinist helper in the round house at Lang Yard, while awaiting his recall by respondent to active duty as a fireman (R. 83); that on January 29, 1935 respondent wrote petitioner that it was again in a position to put petitioner to work as a fireman, (R. 83, 84); that petitioner immediately reported to respondent for work, in response to said recall, in compli-

ance with Article 40 of the written agreements between respondent and its firemen (R. 4); that petitioner then started to work as a fireman on January 30, 1935, the very next day after his recall (R. 84); that after working for respondent as a fireman for about fifteen days in Lang Yard in January and February, 1935, petitioner was requested by respondent to submit to a physical examination by Dr. Burkholder, respondent's then Toledo medical examiner, (R. 84): that on February 18, 1935, said J. F. Hazel wrote to Dr. Burkholder, (Exhibit 18), stating: "You will please arrange to take a physical examination of John E. Gibbons, who has returned to service as a fireman"; that petitioner was then orally informed by respondent's crew dispatcher that he was out of service on account of his physical condition, (R. 84, 107); that the report of Dr. Burkholder's examination does not appear in the record (R. 172); that said J. F. Hazel, who hired petitioner as a fireman in 1929, and who was again in charge of hiring firemen for respondent in March, 1935, arranged for two medical examinations of petitioner by Dr. Stockwell, respondent's chief medical examiner in Detroit, Michigan, (R. 85); that on March 11, 1935 Dr. Stockwell wrote to J. F. Hazel (Exhibit 20) that "since my letter of March 2, we have seen this man again, (referring to John E. Gibbons), we are unable to find any albumen in his urine today. * * * I believe it would be safe to take him into the service now"; that after these examinations by Dr. Stockwell petitioner reported for work as a fireman but was informed that he was still out of the service (R. 85, 99); that on March 7, 1935, J. F. Hazel wrote and delivered to petitioner a letter, (Exhibit 8, R. 30), assuring petitioner that he had been taken out of the service "*because of his physical condition,*" and assuring petitioner that if his physical condition could be cleared that petitioner "can and will be returned to service," pro-

viding petitioner could pass the physical examination required by respondent, (R. 30); that J. P. Main, respondent's general manager in Detroit, then wrote to Mr. Hazel, (Exhibit BB), dated March 15, 1935, advising Mr. Hazel that on account of petitioner's condition of health he, Mr. Main, could not then approve petitioner's application for "re-employment"; that from March, 1935 until July 16, 1940, petitioner repeatedly requested respondent to afford him additional medical examinations, all of which were refused (R. 99, 101); that upon his own initiative petitioner successfuly passed a medical examination by Drs. Stockwell and Schulte, respondent's chief medical examiners in Detroit on July 16, 1940; but that thereafter respondent continued to refuse to restore petitioner to active duty, to his seniority rights, (R. 88), or to afford petitioner additional medical examinations or an opportunity therefor; and that it was not until September 24, 1940 and October 8, 1940 that E. L. Ray, respondent's then general manager, to whom petitioner had applied for a restoration of his seniority rights, informed petitioner by letter that his predecessor had promptly disapproved petitioner's application for employment, (R. 11), (Exhibits J and K). Mr. Ray's said letters in 1940 of necessity referred to Mr. Main's said letter of March 15, 1935, (Exhibit BB), when petitioner was recalled to active duty. No new application for employment was made or pending in 1935. No predecessor of Mr. Ray had ever disapproved petitioner's application of February 14, 1929 in writing or otherwise.

Article 52 of the written agreements, (Exhibits 1, 2 and 3) (R. 4), entered into on November 15, 1924, and as supplemented March 20, 1928, by and between respondent and its firemen, which were in full force and effect from said dates until January 1, 1945, and thereafter, binding petitioner and respondent to the conditions thereof, provides as follows:

"ARTICLE 52

The company will cause to be posted on February 1 and August 1 of each year a seniority list at terminal points." (R. 4);

that in compliance with Article 52 respondent caused to be printed and posted on August 1, 1929 a seniority list of its firemen, (R. 181,) (Exhibit 13), which seniority list was captioned and labelled "Seniority List of Firemen as of August 1, 1929," (Exhibit 13), and contained petitioner's name with the effective date of his seniority as of February 14, 1929, under a column on said seniority roster headed by the words "Date Entered Service" (Exhibit 13); that on February 1, 1930, July 1, 1930 and February 1, 1931 respondent posted similar seniority lists of its firemen, in compliance with said Article 52 of the Working Agreements, each of which contained petitioner's name with the effective date of his seniority, and the date he entered respondent's service as of February 14, 1929, (Exhibits 14, 15 and 21); and that there was no evidence that petitioner knew his name was omitted from respondent's seniority rosters after the roster of February 1, 1931 and up to the time petitioner was recalled to active service on January 29, 1935, (R. 83, 84).

Jedediah Weeks, respondent's trainmaster, was the only official of respondent who testified as to the interpretation given by respondent's officials to the effect of the publication by respondent of seniority lists of its firemen, as provided in Article 52 of the working agreements (R. 4). Jedediah Weeks, in his deposition, taken by respondent, testified positively upon cross-examination that the publication of respondent's roster of February 1, 1931, (Exhibit 21), showed that as of that date petitioner had fully qualified as a fireman and was a regular employee of respondent, (R. 113 to 127 inclusive), his pertinent testimony on this point being as follows: "That he (referring

to John E. Gibbons) was fully qualified." (R. 113, 114); "Had passed the physical." (R. 114); "And also had passed all other requirements." (R. 114); "That he had passed all preliminary qualifications." (R. 121); *"That his application had been approved by Mr. Main."* (R. 122); "that signified that the man had been fully qualified and he had been investigated." (R. 127).

In its answer (R. 10, 11) respondent alleges that respondent never accepted petitioner's application for employment of February 14, 1929; that petitioner was never employed by respondent as one of its regular firemen; *that the Articles of the Working Agreement between respondent and its firemen, while correctly set forth in the amended complaint, (R. 3, 4, 5), are not material to the issues in the case do not affect petitioner's seniority rights, (R. 10); that on January 29, 1935 respondent's trainmaster invited petitioner to apply for work as a fireman but that petitioner failed to pass the physical examination at that time; and that on October 8, 1940 the general manager informed petitioner that his former application for employment had never been accepted or approved, (R. 11).*

This case was tried in the District Court, without the intervention of a jury, and the case was tried "solely upon the facts and the law, without regard or attention to the question of damages." (R. 160.)

In its memorandum opinion of March 25, 1947 (R. 13) the District Court found: "that plaintiff never became a employee of the respondent," (R. 13); that petitioner's application for employment "showed on its face that the employment was to be only temporary until the approval of the application was *endorsed thereon* by the general manager of the respondent" (R. 13); that "such approval by the general manager was never endorsed on the application," (R. 13); and that there was no evidence to substan-

tiate petitioner's claim that the approval by the general manager "could be waived," should it be assumed that such were possible," (R. 13); and that respondent merely allowed petitioner to work on a "temporary or probationary basis until such time as his application could be approved," (R. 14), a correct copy of said opinion being appended hereto. (P. 32.)

The Circuit Court of Appeals, in affirming the judgment of the District Court, by a divided court, upheld the judgment upon the specific ground that appellee (petitioner herein) "*never became an employee of respondent,*" (R. 236), stating as follows, in its opinion:

> "The District Court found that under the terms of appellant's application for employment and other evidence in the record, *appellant never became an employee of the appellee, but was allowed to work on a temporary or probationary basis; hence the court held that appellant had no seniority rights,* and that his right to damages had not been proved.
>
> While other features were presented in the case upon which the District Court did not rule, *we cannot say that its findings upon this phase of the case are unsupported by the record.* It follows that the judgment must be, and hereby is, affirmed."

Circuit Judge Allen did not concur in the judgment "*on the ground stated,*" but upon a question of jurisdiction not presented to the Circuit Court.

The opinions of the lower courts show that Circuit Judge Allen did not agree with the opinion of the District Court and of Circuit Judges Hicks and McAllister, that petitioner "never became an employee of the appellee (respondent herein)."

A determination of this case by this Honorable Court does not involve a consideration of disputed evidence. The judgments of both lower courts were based squarely upon an erroneous interpretation of the written "application

for employment," by holding that said application "*showed on its face* that the employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent (R. 13), when as a matter of simple grammatical construction the written application did not require the written approval by the general manager on the face thereof, but only provided that petitioner's "employment is only temporary until this application is approved." There is a period after the word "approved." Approval by the *general manager* was not required. The application could be approved by any customary method, according to the quoted undisputed testimony of Mr. Weeks, (R. 113, 114, 121, 122, 127), and in accordance with the provisions of the written agreements. The application could be approved by the publication by respondent of seniority firemen's rosters under Article 52 of the working agreements. The application could also be approved by granting petitioner a leave of absence in writing in May, 1929, (R. 198); by admittedly recalling petitioner to active duty in December, 1929, and again on January 29, 1935 (R. 82, 83, 84); by respondent's letter to petitioner of March 7, 1935, (Ex. 8, R. 30); and by other admitted actions by respondent wholly inconsistent with the asserted claim of respondent that petitioner's employment was only temporary.

By stipulation, (R. 31), all original papers and exhibits were forwarded to the Circuit Court by the District Court, and have now been filed in this court. We have quoted herein all pertinent portions of such exhibits.

JURISDICTION OF THIS COURT

The questions here presented for the consideration of this Honorable Court disclose that the United States Circuit Court of Appeals for the Sixth Circuit has decided important questions of federal law which have not been, but should be, settled by this court; has decided federal questions in a way probably in conflict with applicable decisions of this court; and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision; and that this court does have jurisdiction to hear and determine the substantial federal questions here presented. (U. S. Supreme Court Rule 38-(5b.)

The term "employee" is defined in the Railway and Carriers by Air Labor Act, as follows:

> "The term 'employee" as used herein *includes every* person in the service of a carrier (subject to the continuing authority to supervise and direct the manner of rendition of his service) *who performs any work defined as that of an employee* or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which employees may be organized by their voluntary action, *nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.*" (Vol. 10A Fed. Code Annotated, Section 151-5.)

The Railroad Retirement Act of 1934, and as amended in 1935 and 1937, provides as follows:

> "An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or *on leave of absence, or absent on account of sickness or disability;* * * *." (Vol. 10A Fed. Code Annotated, Section 228(d).)

Under the Railway and Carriers by Air Labor Act and the Railroad Retirement Act, the question of whether or not petitioner ever became an employee of the respondent railroad, under the circumstances of this case, presents Federal questions which have never been determined, and which are of vital importance to every railroad employee in the United States. The written agreements between respondent and its firemen, (R. 3, 4, 5) are controlling as to the seniority questions here presented. The Circuit Court of Appeals failed and refused to determine the effect of these agreements upon the questions here presented, although specifically requested so to do in petitioner's petition for rehearing, filed in the Circuit Court of Appeals on January 4, 1949 and denied February 1, 1949. (R. 237 to 245.) The Circuit Court of Appeals and the District Court found that the employer-employee relationship was never created and never existed although the undisputed written evidence disclosed that after petitioner was employed by respondent as a fireman on February 14, 1929, the employment relation thus created has continued to exist as provided in Section 228(D), of the provisions of the Railroad Retirement Act of 1934, and as amended in 1937. (Vol. 10A Fed. Code Annotated, Section 228 (d).)

QUESTIONS PRESENTED

(1) Was not respondent railroad by the publication of seniority rosters of its locomotive firemen in 1929, 1930 and 1931, in accordance with the provisions of its written agreements with its firemen, containing petitioner's name, with the effective date of his seniority as of February 14, 1929, estopped from denying the creation and existence of the employer-employee relationship as of February 14, 1929, between petitioner and respondent; and by such publication did not respondent waive its claim that such employer-employee relationship never existed?

(2) As a matter of law did petitioner's written application for employment by respondent railroad *show on its face* that petitioner's employment by respondent was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent? Was it essential to the creation of the employer-employee relationship between petitioner and respondent that the general manager of respondent approve petitioner's written application for employment on the face of the written application?

(3) Could the employer-employee relationship, established between petitioner and respondent railroad on February 14, 1929, be terminated except in accordance with the provisions of the written agreements, theretofore entered into by and between respondent and its locomotive firemen, after respondent had accepted petitioner as a regular fireman in accordance with the provisions thereof?

(4) Did not respondent railroad, in its letter to petitioner of March 7, 1935, (R. 30), (petitioner's Exhibit 8), written by J. F. Hazel, respondent's official in charge of hiring firemen for and on behalf of respondent, affirm the creation and continuing existence of the employer-employee relationship between respondent and petitioner, and was

not respondent, by such letter obligated as a matter of law to return petitioner to active duty if and when petitioner's physical condition became cleared and petitioner could pass the physical examination required by respondent?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The decisions of the Circuit Court of Appeals and of the District Court have placed in jeopardy the seniority rights of every railroad employee in the United States. Unless these decisions are reversed no employee of a common carrier will know whether he or she is a "regular" employee or is employed on a "temporary" or "probationary" basis, as found by the lower courts.

How can any railroad employee know whether or not his application for employment has been accepted unless he can rely upon the publication of seniority rosters, and other undisputed acts of his employer done in compliance with the written agreements, as proof of that fact? Is it fair or just to permit a common carrier to wait from 1929 to 1940 before informing an employee that it never accepted his application for employment and that such employee has been employed solely on a "temporary" basis because the general manager of such railroad failed to approve the application in writing on the face thereof? The mere statement of this proposition shows its injustice. The employer-employee relationship, as defined in the Railroad Retirement Act, should not be permitted to be jeopardized by such a decision, as the right to retirement benefits will be lost by all such so-called "temporary" or "probationary" employees, where applications may not

have been approved in writing by some designated official of such railroad. Employees should not have to wait from six to eleven years for such an approval or disapproval of an application.

2.

The written agreements between respondent and its firemen, (Exhibits A and B), make specific provision for the protection of the seniority rights of respondent's firemen and engineers. The pertinent provisions of the agreements are set forth in the record (R. 3, 4, 5). After making specific provision for the protection of the seniority rights of its firemen, Article 52 of the Agreements, (R. 4), provides that respondent "will cause to be posted February 1 and August 1 of each year a seniority list at terminal points." The testimony was undisputed that petitioner's name appeared upon the seniority lists posted by respondent for August, 1929, for February and August, 1930, and for February, 1931. The United States Circuit Court of Appeals did not specifically pass upon the question as to whether or not respondent was estopped by the publication of four seniority rosters from thereafter asserting or claiming that petitioner was not an employee of respondent. The District Court, however, "without expressing or intending to express any opinion as to the possibility of respondents waiving such approval," was of the opinion "that there is no evidence here to substantiate such a waiver should it be assumed that such were possible." The District Court found that the publication of the rosters could not bind respondent *unless it was shown that the general manager of respondent had knowledge of the contents of the rosters.* (R. 15, (4).) It was uncontradicted that the rosters were published by respondent in accordance with the provisions of the working agreements. No evidence was offered by respondent that it was customary

for the general manager to approve the rosters before they were published. *Unless railroad employees can rely upon the seniority rosters as evidence of their employment, in protection of their seniority rights, the publication of such rosters would be a vain thing.* It is incomprehensible that the District Court should find that respondent was not bound by the publication of the rosters unless the general manager checked or approved the contents of each roster. Such a contention is wholly untenable. The very fact that the uncontradicted evidence showed that four seniority rosters were printed and posted in accordance with the written agreements is sufficient evidence to bind respondent to the contents of those rosters.

Petitioner's name appeared on each roster as one of its regular employees. Jedediah Weeks, respondent's trainmaster, the only official of respondent who testified on the subject, on cross-examination testified positively that "the publication of petitioner's name upon respondent's seniority list of firemen would indicate that petitioner 'had fully qualified as a fireman and was a regular employee of respondent' (R. 113); that petitioner 'was fully qualified,' 'had passed the physical,' 'had passed all other requirements,' and 'has been accepted as an employee' (R. 114); that petitioner 'had passed all preliminary qualifications' (R. 121); 'that his application had been approved by Mr. Main (general manager),' (R. 122)." The testimony of Mr. Weeks was not contradicted or questioned by any other witness.

The provisions of the Railway Labor Act and the Railroad Retirement Act, hereinbefore set forth, would have no effect whatever in protecting the seniority rights of railroad employees, unless the provisions of the agreements, authorized by the Railway Labor Act, are recognized and enforced by the courts. We submit that the publication of seniority rosters is an established practice by

practically all the common carriers in the United States. Where these seniority rosters are published, in accordance with the provisions of written agreements, common carriers should be bound by the contents of such rosters in determining questions of seniority, unless error is established by such carrier as to the contents thereof. In this case the District Court specifically held that the publication of such rosters, under the written agreements, would not bind the respondent, unless petitioner proved that the general manager of respondent had personally checked and approved such rosters before they were published. Railroads can only carry on their business through their officials. The evidence is uncontradicted that the seniority rosters in the instant case were published and posted in the usual course of business by respondent. We submit that carriers are bound by the contents of seniority rosters, published in accordance with the provisions of the working agreements with their employees, whether such rosters have been checked by the managing officials of such carrier or not; unless the written agreements make special provision for such checking by such officials.

3.

The District Court specifically found that petitioner's application for employment, (Exhibit B) "*showed on its face, that the petitioner's employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent.*" (R. 13). The United States Circuit Court of Appeals in its opinion, affirming the judgment of the District Court, (R. 236), specifically found that "the District Court found that under the terms of petitioner's application for employment and other evidence in the record, petitioner never became an employee of the respondent, but was allowed to work

on a temporary or probationary basis; hence the court held that petitioner had no seniority rights and that his right to damages had not been proved." * * * "We cannot say that its findings *upon this phase of the case* are unsupported by the record." Judge Allen, Circuit Judge, did not concur in the judgment of the Circuit Court of Appeals "on the ground stated," but upon a jurisdictional ground.

The opinion of the District Court Judge (R. 13, 14); the findings of fact and conclusions of law of the District Judge (R. 14, 15, 16); and the majority opinion of the United States Circuit Court of Appeals (R. 236), show that the lower courts based their decisions solely and squarely upon their interpretation of petitioner's written application for employment. *It is our contention that petitioner's application for employment, (Exhibit B), does not show on its face that petitioner's employment was to be only temporary until the approval of the application was endorsed thereon by the general manager of respondent.* (R. 13.) The sentence relied upon by the lower courts, as a basis for their decision, is the fine print appearing immediately above petitioner's signature, which reads as follows: "If put to work, I understand that my employment is only temporary until this application is approved." It is significant that the sentence ends with the word "approved." There is a period after the word "approved." This sentence does not include the words "by the general manager." Although the general manager and several officials of respondent testified for respondent, none of them testified as to any custom or rule of respondent, requiring the general manager to approve an application for employment, on the face thereof, before an employee became a regular employee of respondent. We submit that petitioner's application was in fact approved by the publication of the seniority rosters, and other undisputed actions of respondent in recognition of such approval, as hereinbefore set

forth, after he passed his physical examination and after his qualifications were fully investigated by respondent. The written application, *upon its face, does not require the written approval by the general manager* as a condition precedent to the establishment of the employer-employee relationship between petitioner and respondent for the following cogent reasons:

(a) The application does not state that petitioner "understood" his employment was to be "only temporary" "until this application is approved" (by the general manager). The sentence ends with the word "approved."

(b) The application itself does not state in what manner the application is to be approved.

(c) The space provided in the lower left hand corner for approval by the general manager is not part of the application itself

(d) There was no evidence that petitioner ever read that portion of the application form below his signature, or that he was ever informed by respondent, orally, or in writing, that the general manager of respondent, in Detroit, had to approve his application before he became a regular employee of respondent in Lang Yard, Toledo, Ohio.

(e) The evidence is uncontradicted that petitioner's application was never in his possession, either before or after he signed it (R. 179), so that he cannot be charged with knowledge of the printing on the application below his signature.

(f) The legal interpretation of the application must be construed most strongly against respondent, who admittedly prepared and printed the application form.

(g) The testimony is uncontradicted that petitioner's application of February 14, 1929, was never sent by respondent to the general manager for his approval or disapproval, but it remained in the possession of George E. Cothran, respondent's chief clerk, in Toledo (R. 179).

(h) On February 14, 1929, petitioner successfully passed the physical examination required by respondent (Respondent's Exhibit 17); respondent completed its check of petitioner's references on March 20, 1929 (R. 193); respondent gave petitioner a leave of absence in May, 1929 (Petitioner's Exhibit 23, R. 198); respondent posted petitioner's name on its seniority roster of August 1, 1929 (R. 181) (Petitioner's Exhibit 13); petitioner was recalled to active duty as a fireman in December, 1929 (R. 82); petitioner's name was then posted by respondent upon its seniority rosters of February 1, 1930, July 1, 1930, and February 1, 1931 (Petitioner's Exhibits 14, 15 and 21); and on January 29, 1935, petitioner was again recalled to active duty by respondent (Respondent's Exhibit F, R. 83, 84). During this entire period petitioner's application was never sent to the general manager for his approval or disapproval. In fact the entire space on the application, below petitioner's signature, is still blank and shows neither approval nor disapproval. How could the general manager approve or disapprove the application, *on the face thereof*, if it was never sent to him for such action?

From the foregoing we submit that the written application did not *show on its face* that the employment of petitioner was to be only temporary until the approval of the general manager was endorsed on the application. There was no evidence whatever of an agreement, understanding, or custom that such approval of the application by the general manager was essential to the creation of the employer-employee relationship. The written agreements between the respondent and its firemen made no provision as to temporary or probationary employment. We do not dispute the right of respondent to check an applicant's physical qualifications, his ability, and his former record of employment before accepting his application for employment. The evidence is undisputed, however, that respondent had completed its check of petitioner's qualifications before posting petitioner's name on its seniority list of August 1, 1929 (R. 180, 181, 200).

4.

The record conclusively shows that the employer-employee relationship was never terminated in accordance with the written agreements. The written agreement of March 20, 1928, contained the following rule (R. 5): "Men off on account of sickness will be held in their proper places on the seniority roster and names which have been removed from the roster be restored." It was undisputed that respondent took petitioner out of service only temporarily, after the establishment of the employer-employee relationship on February 14, 1929, either on the ground of reduction of forces, on account of slack business, or on account of alleged physical disability. None of these temporary lay-offs affected petitioner's seniority rights under the rules of the union agreements, (R. 3, 4, 5); and under Section 228(d) of the Railroad Retirement Act of 1937 (Vol. 10A, Fed. Code Annotated): Article 40 of the rules of the written agreements required firemen to report to actual service within thirty days after being recalled (R. 4). The evidence was undisputed that petitioner returned to service the very next day following his recall in 1935. There is nothing in the record to show that the employer-employee relationship between petitioner and respondent has ever been terminated in accordance with the provisions of the agreements, which clearly formed part of petitioner's employment contract. It was not until September 30, 1940, and October 4, 1940, that Mr. Ray, respondent's then general manager, notified petitioner that his predecessor had disapproved petitioner's application, referring to Mr. Main's action in 1935, when no application for employment by petitioner was pending. It is our contention that these letters did not terminate the relationship of employer-employee between petitioner and respondent as that relationship could only be terminated in accordance

with the provisions of the written agreements, after that relationship was once established. It was not until 1940 that petitioner had any hint that respondent questioned his status as a regular fireman of respondent. Up to that time petitioner assumed he was only out of active service on account of a claimed transitory physical disability.

The Circuit Court of Appeals and the District Court failed to decide whether or not the employer-employee relationship was ever terminated in accordance with the provisions of the written agreements. The judgment of the Circuit Court and the judgment of the District Court were squarely upon the ground that the employer-employee relationship *was never created in the beginning,* solely because the general manager never approved the written application for employment upon the face thereof. It is of vital importance that this court determine that the provisions of the working agreements, authorized by the Railway Labor Act, Vol. 10A, Fed. Code Annotated, Title 45, 151(d), are part of the contract of employment after the employer-employee relationship is created.

The District Court, in its memorandum filed June 5, 1945, on a motion to strike, held as follows:

> "I feel, however, that where a regular employee with seniority rights is laid off for sickness and a medical examination is required before he can return to work that *there is a duty on the part of the employer, arising out of the seniority contract,* to afford the opportunity for such examination within a reasonable time after the employee reports himself recovered. Otherwise, an employee's seniority rights would be subject to violation with impunity * * * Here, then if plaintiff was a regular employee the failure of the defendant to afford him an examination was a violation of his seniority rights, or, put in another way, was a breach of that part of his employment contract relating to seniority."

The evidence conclusively showed that respondent wholly failed to afford petitioner the opportunity for additional medical examinations at reasonable times, to determine his physical fitness to be returned to active service, by reason whereof petitioner's seniority rights were violated and petitioner suffered damage. It is apparent from the District Court's memorandum that petitioner would have been restored to his seniority rights by the District Court had it not been for the District Court's erroneous finding that petitioner never became an employee of respondent as is hereinbefore fully discussed.

5.

Neither the Court of Appeals nor the District Court determined the legal effect of the letter written by J. F. Hazel, respondent's superintendent, to petitioner on March 7, 1935, hereinbefore referred to and fully set forth herein (R. 30). This letter speaks for itself and unequivocally assures petitioner that he will be returned to service if his physical condition can be cleared and he can pass the physical examination required by the company. The letter further assured petitioner that he had been taken out of service solely "because of his physical condition." This letter (Exhibit 8), was offered in evidence by petitioner (R. 141). Respondent objected on the ground that Exhibit 8 was only a letter of recommendation and did not bind respondent to anything. (R. 142.) The District Court, in its findings of fact, (R. 15), attached no significance to the legal effect of Exhibit 8 for the alleged reason that there was no evidence that the general manager had knowledge of the writing of this letter. The only testimony in the record as to the authority of J. F. Hazel to write this letter was the testimony of respondent's official, Jedediah Weeks, who succeeded J. F. Hazel as respondent's official

in charge of hiring firemen in Lang Yard in 1933, and who admittedly exercised that authority with the approval of respondent until March, 1935. Mr. Weeks testified that he succeeded to all the authority formerly invested in Mr. Hazel and that had Mr. Weeks written Exhibit 8 he would have had "the authority of the management behind me." (R. 123.) Mr. Hazel, who died before the trial, represented respondent in signing the working agreements with the firemen, dated November 15, 1924 (R. 5). The testimony is uncontradicted that both Mr. Hazel and Mr. Weeks had authority to hire firemen in Lang Yard. No evidence whatever was introduced by respondent questioning the authority of J. F. Hazel to bind respondent to the terms and conditions of Exhibit 8, (R. 30).

The evidence was uncontradicted that petitioner made every possible effort, from March, 1935 to September, 1940, to secure additional medical examinations by respondent to determine his then physical fitness to be returned to active duty. The evidence is likewise uncontradicted that respondent failed and refused to afford petitioner the opportunity for such examinations. The evidence is likewise uncontradicted that petitioner was never discharged by respondent. The evidence is therefore uncontradicted that petitioner was out of the service solely because of his physical condition from March, 1935 to September, 1940, during which period respondent failed to afford petitioner a medical examination or an opportunity therefor. There was no evidence that charges of any kind were ever made against petitioner by respondent, or that the employer-employee relationship was ever terminated in accordance with the provisions of the working agreements.

6.

In *J. I. Case Co. vs. National Labor Relations Board,* 321 U. S. 332, 88 L. Ed. 762 (1944) the U. S. Supreme Court held that collective bargaining between an employer and a union *does not necessarily* result in a contract of employment. This case does not hold, however, that working agreements, such as Exhibits 1, 2 and 3 in this case, do not control the seniority rights of railroad employees under the Federal Railroad Retirement Act of 1937, Section 228(a) (D), of the Railroad Retirement Act of 1937 (10A Fed. Code Ann., R. 223), effective June 24, 1937, which provides in part as follows:

> "An individual *is in the employment relation to an employer* if he is *on furlough,* subject to call for service within or outside the United States and ready and willing to serve, or *on leave of absence, or absent on account of sickness or disability;* all in accordance with the established rules and practices in effect on the employer."

Unless the seniority rights of railroad employees are protected by the working agreements, then a railroad employee could be discharged without cause and the employee's seniority would be valueless.

The case of *Yazoo and M. V. R. Co. vs. Webb,* 64 F. (2d) 902, decided in 1933, relied on by respondent in the lower court, is an authority in favor of petitioner. It is not petitioner's claim that the railroad agreements, (Exhibits 1, 2 and 3), establish a contract between respondent and petitioner. It is petitioner's contention that after the employer-employee relationship is established that the rules of the working agreement control the rights of the parties.

As a matter of law the written agreements definitely became a part of petitioner's contract of employment. The

lower court correctly stated the law applicable to this important issue in its memorandum of March 10, 1945, in which the lower court stated:

> *"As I understand the law, the (petitioner) would have a right of action for violation of seniority rights* if being employed by the (respondent) he was laid off and during his layoff period the (appellee) employed a fireman junior in rank to him. *This is so, because the Union agreement sets up such a plan and becomes the basis for any individual contract of employment. Yazoo and M. V. R. Co. vs. Webb,* 64 Fed. (2d) 902 (C. C. A. 5); *Illinois Central R. R. Co. vs. Moore,* 112 Fed. (2d) 959 (C. C. A.)."

The written agreements definitely provide that an employee cannot be discharged or removed from service except in accordance with the terms and provisions of the written agreements. Employees can only be discharged for cause, and after affording the employee the opportunity of a hearing, as provided in the agreements (Exhibit 1, Art. 49). The agreements, therefore, do make definite provision for the continued employment of employees so that their seniority rights cannot be violated with impunity. The Railroad Retirement Act would be of no value whatever to railroad employees unless seniority rights were protected in accordance with the working agreements.

Because of the provisions of the Railroad Retirement Act the seniority rights of a railroad employee has become a thing of great value to the employee. It is likewise valuable to the railroad companies in that it enables the railroads to keep in their employment high-grade men. If an employee could be discharged at the whim or caprice of the railroad, as claimed by respondent, then an employee's seniority rights could be violated with impunity by the railroad company. It is absolutely necessary that the working agreements be strictly followed by the Railroad

Company to preserve the seniority rights of its employees. Of necessity the agreements do become an integral part of the contract of employment.

The working agreements of 1924 and 1928 (Appellant's Exhibits 1 and 2), conclusively show on their face that the agreements are between the Railroad Company AND ALL OF ITS ENGINEERS, FIREMEN AND HOSTLERS, *as represented by the Union.* The Union representative signed as the accredited representative of all the employees, and for the benefit of all the employees designated therein. These agreements speak for themselves. The plain terms of the agreements themselves can have no other construction or interpretation.

Paragraph 2 of the syllabus in *Baron vs. Kurn, Trustee,* 349 Mo. 1202, referred to by the lower court in its memorandum of March 10, 1945, is as follows:

> "2. An employee may acquire rights under a labor union's contract with his employer independent of his individual contract of employment."

In the opinion of the court in *Baron vs. Kurn,* discussed in 142 A. L. R. 789, the court states:

> "The railway does not question the right of individual yardmen generally to enforce the provisions of the Yardmen's Schedule, and the issues do not embrace any discussion of the theory or theories underlying such right. *Courts of this and other states have advanced, among others, the reasoning that the employee may enforce the contract as a third party for whose benefit it was made. McCoy vs. St. Joseph Belt Ry. Co.,* 229 Mo. App. 506, 514, 77 S. W. (2d) 174, 180 (2, 3); *Hall vs. St. Louis-S. F. Ry. Co.,* 224 Mo. App. 431, 435, 28 S. W. (2d) 687, 689 (3). Consult Annotations, 95 A. L. R. 10, 41; 81 A. L. R. 1271, 1302, 2 Williston on Contracts, p. 1099, Sec. 378A. If language found in *Burnetta vs. Marceline Coal Co.,* Div. II, 1904, 180 Mo. 241, 250, 79 S. W. 136, 139, is to be construed that an employee may

not acquire rights under a labor union contract with his employer independent of his individual contract of employment, we think it *out of line with the trend of modern authority and should not be longer followed in that respect.*"

In *Dooley vs. Lehigh Valley R. Co.*, 21 Atl. Rep. 2nd, page 334, paragraphs 1 and 3 of the syllabus are as follows:

"1. A contract between employer and union not only enters into individual contracts, but circumscribes the rights of employer and members of union with respect to making individual contracts and creates legal rights and duties which are independent of particular hirings."

"3. 'Seniority' represents in the highest degree the right to work, and by seniority the oldest man in point of service, ability and fitness for the job being sufficient, is given choice of jobs, is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service."

This case includes a full and complete discussion of the rights of an employee to maintain an action against the railroad for any violation of his seniority rights and discusses in detail many decisions in reference thereto. In its opinion at the bottom of page 337 and the top of page 338 the court states as follows:

"The contract between employer and union not only enters into the individual contract, but it circumscribes the rights of the employer and the members of the union with respect to making individual contracts of employment. It creates legal rights and duties which are independent of particular hirings. The development of the law on the subject is treated in 95 A. L. R. 10."

One of the leading cases on this subject is the case of *Illinois Central R. R. vs. Moore,* 112 Fed. (2d) 959 and C. C. A. 5, referred to by the lower court in its memorandum of March 10, 1945. This is one of the latest cases which discusses the nature of the employee's contract in its relation to the written agreements. Paragraph 14 of the syllabus in that case is as follows:

> "A railroad which had contract with trainmen's union could not discharge switchman at will on *grounds that employment was for no definite time and that employee might quit at any time and that to cut off right to discharge at will a clear stipulation was required, where contract contained stipulation that cause of discharge should be stated and hearing given on demand, and, if 'found to be unjust, yardmen and switchtenders shall be reinstated and paid for all time lost,' which implied that discharge was not to be at employer's will but only for just cause of which railroad officers were not the sole or final judges. Railway Labor Act, as amended, T. 45 U. S. C. A. 151, et seq.*"

From the foregoing it is apparent that the signing of an application for employment by petitioner was merely the preliminary step utilized by respondent to secure information as to petitioner's past record and qualifications. In no sense could it constitute the contract of employment. *The actual contract of employment of necessity had to be in conformity with the written agreements then existing between respondent and its firemen.* No provision whatever appears in any of the agreements requiring firemen to sign an application form. *There is no provision in any of the agreements, which have been introduced in evidence, requiring respondent's approval of an application for employment.* In other words, the requiring of an application was merely for the convenience of respondent. The respondent did not have to put petitioner to work merely

because petitioner signed an application. *There are no provisions in any of the agreements providing for temporary employment.* After petitioner passed the physical examination there was still no obligation whatever upon respondent to put petitioner to work. Respondent had the right to check petitioner's former record of employment and his qualifications and to decide whether or not to put petitioner to work.

The agreement of November 15, 1924, made specific provisions as to the means by which this relationship, once established, could be terminated by action of the respondent. Article 49 of the agreement of November 15, 1924, provided that firemen will not be disciplined *or dismissed* (except for intoxication or insubordination) *until after investigation* (Exhibit 1). This Article also provides for a hearing in the event charges are preferred against the employee. The undisputed testimony is that the employer-employee relationship was created in accordance with the written agreements and that respondent never terminated that relationship, and never attempted to discipline or dismiss petitioner or prefer charges of any kind against him. Petitioner was merely taken out of active service, temporarily, in 1935 on account of his then physical condition.

PRAYER

Wherefore, petitioner prays that a writ of *certiorari* be issued by this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that said opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit in said cause of *John E. Gibbons, petitioner herein, vs. The Detroit and Toledo Shore Line Railroad Company, respondent herein,* Cause No. 10636, be reviewed by this court as provided by law, and upon such review said judgment be reversed, and that petitioner have such other relief as to this court may seem appropriate.

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Attorney for Petitioner.

APPENDIX A

MEMORANDUM OPINION OF DISTRICT COURT

(Filed March 25, 1947)

Kloeb, J.:

In this case, plaintiff seeks to recover damages in the amount of $18,220.00 for breach of seniority rights. He claims that he was employed by the defendant in 1929, and worked there intermittently until 1935, when he was laid off. He claims that, shortly thereafter, he was ready and able to return to work, but that the defendant employed other firemen junior to him in seniority in violation of his rights and to his damage in the amount previously stated.

As the court indicated in its Memorandum Opinion of March 13, 1945, a cause of action based on violation of seniority rights presupposes the existence of the employer-employee relationship, and a temporary layoff in violation of seniority rights. "The evidence in this case conclusively shows, in the court's opinion, that the *plaintiff never became an employee of the defendant.* There is no question that he made an application for employment to the defendant in February of 1929, which application showed, on its face, that the employment *was to be only temporary until the approval of the application was endorsed thereon* by the general manager of the defendant." It cannot be disputed that such approval was never endorsed on the application. Plaintiff alleged in his complaint that the defendant, in writing, accepted his application for employment, but at the trial he offered no evidence whatever to substantiate this contention. Plaintiff argues at some length that the approval of the application could be waived and was, in fact, waived by the defendant's conduct in this case. Without expressing, or intending to express, any opinion as to the possibility of the defendant's waiving

such approval, the court is of the opinion that *there is no* evidence here to substantiate such a waiver should it be assumed that such were possible.

"Plaintiff did do some work for the defendant, but the court is convinced that he never became an employee of the defendant, but was merely allowed to work on a temporary or probationary basis *until such time as his application could be approved. The evidence clearly shows that, not only was his application never approved, but that, on the contrary, it was specifically disapproved by the general manager of the defendant.*"

Under such circumstances, the plaintiff has failed to prove his right to damages, and judgment must be rendered for the defendant.

Defendant may have ten (10) days within which to file Findings of Fact and Conclusions of Law drawn in accordance with this opinion, and plaintiff may have five (5) days thereafter within which to file any corrections or suggested additions thereto.

Frank L. Kloeb,
United States District Judge.

Toledo, Ohio, March 25, 1947. R. 13, 14.

APPENDIX B

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 15, 1948)

Before Hicks, Chief Judge, and Allen and McAllister, Circuit Judges.

Per Curiam. In this case appellant sought damages against the appellee for $18,220 for breach of seniority rights, in a petition which was dismissed by the District Court. The appellant had worked as fireman for appellee in 1929 and 1935 for approximately 47 days in the aggregate.

The District Court found that under the terms of appellant's application for employment and other evidence in the record, appellant never became an employee of the appellee, but was allowed to work on a temporary or probationary basis; hence, the court held that appellant had no seniority rights and that his right to damages had not been proved.

While other features were presented in the case upon which the District Court did not rule, we cannot say that its findings upon this phase of the case are unsupported by the record. It follows that the judgment must be, and it hereby is, affirmed.

Allen, Circuit Judge, concurring. I think the judgment should be affirmed, not on the ground stated, but on the ground pleaded in the answer and clearly sustained by the record, that the action brought in 1944, based upon an alleged breach of oral contract occurring in 1935, is clearly barred by Section 11222, General Code of Ohio. (R. 236.)